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No. 06-1217

In the Supreme Court of the United States

IOWA NETWORK SERVICES, INC.,
Petitioner,

v.

QWEST CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The words in Iowa Network Services, Inc's ("INS") federal tariff expressly include the term "intrastate" and, therefore, by its plain terms, the tariff applies to local calls. App. 177a, 180a. The Brief in Opposition filed by Qwest Corporation ("Qwest") does not dispute this fact, nor could it. The analysis should have ended there with application of the local tariff terms as written.

Instead, the lower court has created uncertainty as to whether the words in federal tariffs governing the most important industries in this country have any meaning whatsoever. The decision below undermines a century of this Court's filed rate doctrine precedent requiring meaning to be given to the words contained in a federal tariff in order to avoid discriminatory treatment among customers. Yet, as a consequence of the decision below, the same words in a tariff will apply to some customers, but will be treated as if they are not written in the tariff at all for one customer, Qwest. Furthermore, the decision below will inflict chaos upon numerous federal regulatory regimes established by Congress, if a carrier (whether it be a telephone company, energy company or railroad) is prohibited by some state commissions from giving any meaning to words in a tariff administered by a federal agency, while other state commissions require the carrier to give effect to those same exact words in the federal tariff. The petition for certiorari should be granted to avoid such profound and adverse consequences for the orderly administration of tariffs that Congress and numerous federal agencies rely upon for the regulation of our country's industries.

ARGUMENT

I. The FCC Was Authorized to Accept the Addition of Local Terms to INS' Federal Tariff.

Qwest is wrong to suggest that the Federal Communications Commission ("FCC") lacked statutory authority to accept the local tariff terms. Qwest Opp. Br. pp. 15-17. In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress granted the FCC authority to regulate local calls. This Court has reversed previous efforts by the Eighth Circuit to limit such FCC authority, and should do so again here. "But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

The local tariff terms were filed with the FCC pursuant to 47 U.S.C. § 204(a)(3), which was added by the 1996 Act. As the 1996 Act extended the FCC's regulatory jurisdiction over local calls, Congress expected that portions of the 1996 Act that were silent on their jurisdictional reach like Section 204(a)(3) would apply to local calls. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 378. Section 204(a)(3) states that a local exchange carrier "may" file a tariff for "any such charge", and does not contain any jurisdictional limitation through reference to "interstate", as can be found in other parts of the statute.

Qwest erroneously tries to import the "interstate or foreign" limitation in Section 203 to a later enacted provision in a different section, Section 204. Qwest Opp. Br. 17. This Court rejected a similar statutory construction argument and

refused to import the "interstate or foreign" limitation in Section 201(a) to Section 201(b). *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 378. Furthermore, because the local tariff terms apply to wireless cell phone calls, they are also within the FCC's plenary authority under 47 U.S.C. § 332 to regulate matters affecting cell phone calls.

The Federal Communications Commission ("FCC") accepted the addition of local terms to the federal tariff pursuant to 47 U.S.C. § 204(a)(3) and those local tariff terms are, therefore, "conclusively lawful". *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411-412 (DC Cir. 2002). Qwest's arguments are nothing more than challenges to the lawfulness of a tariff that Congress and the FCC have deemed conclusively lawful. Despite many opportunities to do so during the six year history of this case, the FCC has not once questioned or issued any decision requiring a revision to those local tariff terms.

II. The Local Terms in INS' Tariff Establish a Section 251(b)(5) Reciprocal Compensation Arrangement.

Qwest's suggestion that "agreements" are the "exclusive" means of establishing compensation under 47 U.S.C. § 251(b)(5) completely ignores the use of the term "arrangement" rather than "agreement" in Section 251(b)(5). Qwest Opp. Br. p. 5. A tariff is an arrangement. As a "local exchange carrier", as defined by 47 U.S.C. § 153(26), INS was entitled to receive compensation under Section 251(b)(5) for the local calls it transported for Qwest. INS' tariff explicitly states that it is a Section 251(b)(5) local reciprocal compensation tariff. App. 177a. Qwest's interpretation of the term "reciprocal compensation" is overly narrow because the term, as used in Section 251(b)(5) includes "transport" and INS provided "transport" to Qwest.

Qwest Opp. Br. 15. However, like hundreds of other local exchange carriers, INS is not an "incumbent local exchange carrier" as defined by 47 U.S.C. § 251(h), and the interconnection agreement provisions of 47 U.S.C. § 251(c)(1) apply only to "incumbent local exchange carriers".

None of the FCC decisions cited by Qwest invalidate INS' Section 251(b)(5) tariff for local reciprocal compensation. Subsequent to the *Global NAPs* case cited by Qwest, Qwest Opp. Br. 16, the FCC expressly held that *Global NAPs* does not prohibit such tariffs. "The Commission has determined that interconnection rates imposed via tariff may be permissible". *Developing a Unified Intercarrier Compensation Regime, Declaratory Ruling and Report and Order*, 20 FCC Rcd 4855 (2005). Qwest's reliance on the *Texcom* and *Virginia Arbitration* decisions are also misplaced. Qwest Opp. Br. pp. 12-14. Neither of those cases addressed the lawfulness of INS' Section 251(b)(5) tariff. In *Texcom*, the FCC confirmed that an intermediary local exchange carrier like INS, that only provides a transiting or transport service in the middle of the network, is not subject to the regulations applicable to interconnection agreements for carriers that either originate or terminate a call. *Texcom v. Bell Atl., Order on Reconsideration*, 17 Rcd. 6275, 6277 (2002).

The decision in the *Virginia Arbitration Order* supports the application of INS' tariff to local calls that Qwest commingled with other calls so that INS could not identify the originating carrier. Because Verizon, like Qwest in this case, had the business relationship with the originating carrier, the FCC in the *Virginia Arbitration Order* permitted Verizon to be billed by other carriers when Verizon failed to provide information necessary for those other carriers to bill the

originating carriers. *Virginia Arbitration Order*, 17 FCC Rcd 27039 ¶¶ 541, 545.

III. If This Court Is Uncertain Whether INS' Tariff Complies with Any FCC Regulation, It Should Remand this Case to the Lower Court with Instructions to Stay Further Proceedings and Refer this Case to the FCC Pursuant to the Doctrine of Primary Jurisdiction.

Despite Qwest's allegations to the contrary, Qwest Opp. Br. pp. 18-19, the local tariff terms set forth in INS' federal tariff are clear and unambiguous, and fully comply with the FCC's rules and decisions. However, if this Court is uncertain as to the application of certain FCC regulations, it should grant certiorari for the limited purpose of remanding this case to the Eighth Circuit with instructions to stay further proceedings and refer those questions relating to FCC regulation to the FCC. The doctrine of primary jurisdiction is concerned with promoting the proper relationships between the courts and administrative agencies charged with particular regulatory duties. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). The principle is firmly established that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). A stay of further proceedings pending such a primary jurisdiction referral is necessary to avoid the unfair disadvantage that would result if this case was dismissed, as the two year statute of limitations in 47 U.S.C. § 415 has expired. *Brown v. MCI Worldcom Network Services, Inc.*, 277 F.3d 1166, 1173 (9th Cir. 2002), *citing Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993).

CONCLUSION

Contrary to a century of this Court's precedent applying the filed rate doctrine, the Eighth Circuit has failed to give any meaning whatsoever to the words in a federal tariff that the DC Circuit has held to be "conclusively lawful" under 47 U.S.C. § 204(a)(3). This Court should therefore grant certiorari and resolve the conflict. Alternatively, should there be any uncertainty regarding the application of the FCC's regulations, this Court should grant certiorari for the limited purpose of remanding this case to the Eighth Circuit with instructions to stay further proceedings and refer the questions relating to FCC regulations to the FCC.

Respectfully submitted,

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